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CRIMINAL LAW

United States v. Lance, 848 F.2d 1497

Defendant, a former county commissioner, was indicted and convicted on charges that he took kickbacks in connection with county purchases in violation of the mail fraud statute, 18 U.S.C. § 1341. In light of the Supreme Court's decision in *McNally v. United States*, 483 U.S. 350 (1987), defendant asserts his mail fraud convictions are invalid. The district court ruled that *McNally* should not be given retroactive effect and denied relief. This court differentiates between 1) split deals, where the county is billed for items it never receives and the money obtained through fraud is split 50-50 between the suppliers and the defendant and 2) kickbacks where the county did receive materials and the defendant received cash payments for placing orders with various vendors. The Tenth Circuit Court of Appeals concluded that Lance failed to establish prejudice with respect to the counts involving split deals and affirmed the denial of relief on those counts. On the remaining counts, they held that the mail fraud convictions are invalid because either the indictment failed to charge a crime or the jury instructions and evidence permitted Lance to be convicted on the basis of conduct that is not a crime. Remanded with directions to vacate the convictions, fines, and sentences on those counts.

United States v. Minanda-Enriquez, 842 F.2d 1211

Appellant Minanda-Enriquez was deported from the United States to Mexico. The next year, when he returned to the United States to visit his family, the border patrol agents allowed him to cross the border. He was subsequently arrested and convicted of illegal entry after deportation under 8 U.S.C. § 1326. Appellant contends that the conviction required proof of intent to violate the law and that he would be allowed to base his defense on the mistaken belief that he was lawfully present in the United States.

The Tenth Circuit held that the government does not need to show that the defendant willfully and knowingly engaged in criminal behavior, but only that the defendant's acts were willful and knowing. Appellant voluntarily reentered the United States. Therefore, the court affirmed his conviction for illegal entry after deportation.

Chavez v. Kerby, 848 F.2d 1101

Petitioner Chavez, a state prisoner, filed a petition for a writ of habeas corpus. Chavez had been convicted of criminal sexual penetration of a child under the age of 13. Chavez claims his right to due process was violated because testimony by the victim of another sexual encounter with the defendant was admitted. Defendant also alleges the

trial court refused to instruct the jury on a lesser included offense. Affirmed.

The Tenth Circuit held that the admission of testimony by the seven year old victim of the prior act of sexual intercourse with defendant in prosecution of defendant for criminal sexual penetration did not result in fundamental unfairness that would warrant habeas corpus. Additionally, variance between the victim's testimony at trial and her testimony before the grand jury was insufficient to require instruction on a lesser included offense.

United States v. Jones, 841 F.2d 1022

While executing a search warrant, law enforcement officials seized nine firearms at Jones' residence. Four of the guns had been reported stolen and Jones was charged with receipt of firearms by a convicted felon. The government could not establish exact dates as to when the guns were stolen. The other five guns were used on a separate charge against Jones for possession of firearms by a convicted felon. Jones was convicted on both counts. On appeal, Jones contends that the two convictions represent duplicate convictions.

The Tenth Circuit held that because the government could not establish dates or specific acts or transaction of receipt, it cannot divide the collection of firearms into separate receipt and possession offenses. Because the prosecution has only one conviction and one sentence, one of the convictions must be vacated.

United States v. Hall, 843 F.2d 408

A narcotics defendant filed a collateral attack on his conviction, arguing that his continuing criminal enterprise conviction should be vacated. The district court denied the motion and the defendant appealed. The court of appeals held that a felony in violation of 21 U.S.C. § 846 (Controlled Substances Act) is a felony for purposes of establishing a continuing criminal enterprise under § 846, even though such conspiracy is a lesser included offense under § 848.

United States v. Barrett, 837 F.2d 933

Appellant Barrett appeals his felony conviction of forging and uttering a treasury check of \$236.88 pursuant to 18 U.S.C. § 495. Affirmed.

Following an adverse jury verdict and six-year jail sentence, Barrett moved to correct his sentence on the grounds 18 U.S.C. § 510 treats forgery of a treasury check of less than \$500 as a misdemeanor, and that this provision repealed by implication 18 U.S.C. § 510. In affirming the conviction and sentence, the court of appeals noted that prosecutors have long had the discretion of prosecuting under different statutes, and that barring "positive repugnancy" between statutes, repeals by implication will not be found.

United States v. Apodaca, 843 F.2d 421

Defendant was convicted of engaging in a continuing criminal enterprise, using a communication facility in connection with the commission of a felony and unlawful possession of a firearm. Defendant argues the evidence was insufficient to support the continuing criminal enterprise charge in that it failed to show he organized, supervised or managed five or more persons. Further, he argues the court committed reversible error by allowing the government to introduce evidence of predicate offenses not specifically alleged in the indictment. Last, he argues that the trial court abused its discretion and abridged his right to a fair trial by permitting the marshal to secure his legs with a chain during the trial. Affirmed.

The Tenth Circuit held that evidence supported the jury's finding that defendant occupied the position of organizer, supervisor or manager of metamphetamine drug dealers in addition to managing middlemen. Additionally, it held that an indictment is not constructively amended when admission of uncharged acts does not create substantial likelihood that defendant was convicted of an offense other than that charged in indictment. Last, the court held that securing defendant with a leg chain was not an abuse of discretion in light of defendant's past dangerous acts and the marshal's belief that restraints were absolutely necessary. Furthermore, visibility of these restraints were minimized in that defendant was brought into and removed from the courtroom while jury was not present.

United States v. Gaudreau, 860 F.2d 357

The United States government appeals from a district court decision dismissing the RICO counts of a racketeering indictment. Reversed and remanded.

The defendants were charged with violating Colorado's commercial bribery statute for conspiring with a Mr. Lee, of the Public Service Company of Colorado, in racketeering activity. Mr. Lee and the defendants agreed that Mr. Lee would accept money in exchange for awarding public service contracts to the defendant's supply business. Additional charges against the defendants were sought by the government under the Racketeer Influenced Corrupt Organization Act (RICO). The RICO charges were dismissed by the district court because the provisions of the Colorado statute, which served as a predicate for establishing RICO charges, were held void for vagueness, both facially and as applied in the case at bar.

The Tenth Circuit reversed the finding that the Colorado penal statute at issue did define the criminal offense with sufficient definiteness. The statute also provided for adequate enforcement standards and did not encourage arbitrary or discriminatory enforcement. Furthermore, the facial challenge as to the constitutionality of the statute is inappropriate since (1) the statute itself did not threaten to chill constitutionally

protected conduct, and (2) the challenge did not take place in a declaratory judgment action where no one had yet been charged.

United States v. Shelton, 848 F.2d 1485

Appellants Shelton and James appeal their convictions under the mail fraud statute, 18 U.S.C. § 1341, on the grounds the Supreme Court's decision in *McNally v. United States*, 483 U.S. 350 (1987), invalidated their convictions. The district court refused to give *McNally* retroactive effect, and denied relief for the defendants. Reversed.

The defendants were once Oklahoma County commissioners, and were convicted of mail fraud committed in the course of a kickback scheme involving country purchases. The government never proved this scheme deprived of money or property; rather, the only loss was the citizens intangible right to honest government. Since the *McNally* decision limited applications of the mail fraud statute to deprivations of money or property, the court of appeals found that the defendants would not have been subject to the laws which they were convicted of violating. Thus, the defendants were entitled to the habeas corpus relief they sought.

United States v. Maranzino, 860 F.2d 981

Defendant appeals the district court's denial of his motion to dismiss an indictment against him. Affirmed.

Defendant was indicted in 1985 for three counts of making materially false statements to federally insured banks. Count III of that indictment charged the defendant with falsely representing his existing debts in a credit application. Count III is the only count at issue in this appeal. The defendant was later indicted in 1987 on a count similar to Count III of the 1985 indictment. Defendant argued that the indictment arose out of the same transaction as Count III of the 1985 indictment which was dismissed as part of a plea bargain.

The court found that Fed. R. Crim. P. 8(a) does not require the government to charge all related offenses in the same indictment. The district court's refusal to apply the "same transaction" test was affirmed since this indictment did not allege a conspiracy to defraud a financial institution. Finally, this court determined that the district court did not abuse its discretion in denying the defendant's request to see his presentence report for purposes of proving his allegation that the current charges were included in his 1985 plea agreement which dismissed similar charges in Count III.

United States v. Brandon, 847 F.2d 625

Appellant appeals his conviction by jury under 21 U.S.C. § 841(a) for knowing possession of cocaine with intent to distribute, and the enhanced sentence he received under 21 U.S.C. § 841(b)(1)(B)(ii) for a conviction involving more than 500 grams of cocaine. Affirmed.

Appellant first contends that the district court improperly admitted for impeachment purposes evidence that a black bag found in his motel room contained traces of cocaine. The panel held that the cross-examination of the appellant concerning the black bag was "reasonably suggested" by the appellant's direct examination and was therefore proper. The panel also held that the district court properly exercised its discretion by taking steps to limit any unfair prejudice resulting from the cocaine's admission to impeach.

Appellant contends that the district court erred in failing to suppress the cocaine found under the motel room mattress. The district court found that the search was within the permissible scope of appellant's consent, and the panel concluded that the finding was not clearly erroneous.

The appellant next contends the evidence was insufficient to show specifically that he possessed the cocaine seized with an intent to distribute and therefore his conviction is invalid. The panel found that a reasonable jury could find the appellant guilty beyond a reasonable doubt based on the significant circumstantial evidence and the reasonable inferences drawn therefrom.

Finally, the appellant raised two constitutional challenges to the enhanced sentencing provision under 21 U.S.C. § 841(b)(1) (B)(ii). The due process challenge fails because the panel found the government met its burden of alleging and proving the quantity of cocaine possessed by the defendant. The panel also found, however, that all defendants sentenced under § 841(b) (1)(B) from October 27, 1986, when the enhanced sentencing provisions became effective, to November 1, 1987, the effective day of the statute, received identical treatment under the statute. Thus, there was no equal protection violation.

Lastly, the panel found that the appellant's sentence is not so grossly disproportional to his crime as to violate the eighth amendment's prohibition against cruel and unusual punishment.

